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No. 85-259

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD AMEEN MISLEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 14-17) that the district court erred in refusing to turn over to him during trial statements that his estranged wife had made to government agents.

1. Petitioner was indicted by a federal grand jury in the Western District of Oklahoma on three counts of possession of controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1). After a jury trial, he was acquitted on the three felony counts but convicted on lesser included misdemeanor offenses of simple possession. He was sentenced to one year's imprisonment on each of the three counts, the sentence on Count 2 (possession of methaqualone) to run consecutively to the sentence on Count 1 (possession of cocaine), and the sentence on Count 3 (possession of diazepam) to run concurrently with those on Counts 1 and 2. He was also fined $5,000 each on Counts 1 and 2.

2. The evidence at trial established that in the fall of 1982 the Special Operations Unit of the Norman, Oklahoma Police Department began to investigate allegations that petitioner was involved in illegal drug trafficking (1 Tr. 49-51, 128; 3 Tr. 3-4). On February 16, 1983, petitioner's residence was searched pursuant to both federal and state search warrants, based on information supplied by petitioner's wife. The federal warrant authorized a search for business records and other items relating to suspected income tax violations, and the state warrant authorized a search for items related to illegal drug use and distribution (1 Tr. 50; 2 Tr. 99, 104-105, 124; 3 Tr. 6-8, 35). The officers found the following items inside a locked closet in petitioner's house: some plastic bags containing cocaine, two film containers filled with methaqualone tablets, one hundred diazepam tablets, and, in a safe in the closet, some $71,000 in currency. Also found were a set of scales containing traces of cocaine and other items of drug paraphernalia (1 Tr. 56-59; 2 Tr. 79-88, 160-165).

3. Both during trial and in a post-trial motion, petitioner sought access to certain materials he claimed should have been provided to the defense under both the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland,* 373 U.S. 83 (1963). They consisted of transcripts of interviews with petitioner's wife, who was a government informant in this case, as well as an affidavit from Mrs. Misleh. The materials were submitted to the district court in camera during trial, and the court concluded that they contained no exculpatory material (1 Tr. 149-B). The court reached the same conclusion following a motion for a new trial,[1] adding that production was not required by the Jencks Act since Mrs. Misleh did not testify at trial (4/2/84 Order). The court of appeals affirmed (Pet. App. 1a-3a).

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[1]Petitioner appended the materials to his motion for a new trial. He had obtained them in a related forfeiture proceeding.

4. Petitioner contends (Pet. 14-17) that the district court erred in refusing to order production of the taped interviews of petitioner's wife. Both lower courts concluded, however, that production was not required under *Brady* because the materials were not exculpatory. This factbound issue does not warrant further review. *United States* v. *Doe,* No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge,* 458 U.S. 613, 623 (1982).[2]

As the Court recently explained in *United States* v. *Bagley,* No. 84-48 (July 2, 1985), slip op. 10, "suppression of [favorable] evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." Addressing the degree of materiality that exculpatory evidence must possess in order to warrant reversal of a conviction in these circumstances, the Court held (*id.* at 14): "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the preceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

As the court below correctly held, there was no real dispute on the question of petitioner's possession of the drugs (the offense for which he was convicted). Thus, there is no likelihood whatever that the outcome would have been different had the transcripts of the interviews with his wife been furnished to the defense prior to trial. The court of appeals noted that the cross-examination of the relevant government witnesses was directed in the main to the question whether petitioner had an intent to distribute the controlled substances. Since he was acquitted on the charges of

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[2]The courts below were manifestly correct in holding that the interviews with petitioner's wife were not producible under the Jencks Act, since she did not testify. By its terms that statute applies only to the statements of witnesses.

possession with intent to distribute, the court correctly concluded that the transcripts would have been of no use to the defense (Pet. App. 2a-3a).

Nor is there any merit to petitioner's contention that some statements in the transcripts would have supported his claim of a conspiracy between government agents and his wife to steal money from his safe and to camouflage that theft by planting drugs in the house. This, he asserts, would have supported his claim that he never knowingly possessed the drugs. In fact, however, the transcripts lend no support to petitioner's claimed defense. The transcripts are replete with statements by Mrs. Misleh explaining her husband's involvement in illegal activities, including specific statements about the whereabouts of drugs in the house (see Motion for New Trial, Exh. B at 5-6, 11-12, 56, 58, 81-82, 115-116). There was some concern expressed about how Mrs. Misleh would support herself once she left her husband and it became known that she had furnished information to law enforcement authorities (*id.* at 90, 120-121), but nothing to suggest a plot to steal petitioner's money or to plant the controlled substances. As the district court noted in its order denying the motion for a new trial, the evidence in support of the charge of possession of controlled substances was substantial. Several police officers testified to the discovery of the drugs, and the chain of custody was amply established (4/2/84 Order 3). Nothing in Mrs. Misleh's statements cast doubt upon the finding of guilt on that charge; indeed, they only corroborated the jury's verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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